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No. A-817

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1985

RICHARD TURZAI,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA LIQUOR CONTROL BOARD,
Respondent

On Petition for Writ of Certiorari From the Opinion and Order of the Commonwealth Court of Pennsylvania.

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

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1. Was the notice provided to the Petitioner advising him of the location, nature and date of the offense, sufficient to apprise Petitioner and assure that his due process rights were protected?

2. Did the Pennsylvania Civil Service Commission ruling to prohibit the admission of an investigative report which was utilized by the Petitioner for impeachment of the author of the document on cross-examination constitute reversible error, in light of the fact that the document constituted cumulative evidence?

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COUNTER-STATEMENT OF THE CASE

On April 22, 1983, Jaroslew Danyluk (Danyluk), Enforcement Assistant Supervisor of the Pennsylvania Liquor Control Board (LCB), received an anonymous telephone call indicating that Sabo's Cafe had been tipped off concerning an investigation.

Danyluk and Assistant Supervisor J. L. Herron (Herron) were assigned by Supervisor Robert Berg (Berg) to investigate the matter. Danyluk testified that at that time an enforcement investigation at Sabo's Cafe was being conducted by Enforcement Officer Sam Cangey (Cangey). Berg also indicated that he was responsible for making investigative assignments of liquor licensed establishments.

On May 2, 1983, Danyluk and Herron entered Sabo's Cafe and interviewed Elaine Russell (Russell), a barmaid at the Cafe. Russell stated that she was approached by "Rich" sometime during the week of April 11, 1983. She knew that "Rich" was an LCB agent. Prior to Russell's description of Richard Turzai (Turzai), Danyluk did not know the identity of the informer. Russell indicated that she freely gave information to Danyluk and she also knew Turzai independent of any suggestion of his last name by Danyluk. She independently identified "Rich" by pointing him out at the Pennsylvania Civil Service Commission (Commission) hearing.

Turzai informed Russell that an investigation was being conducted at Sabo's Cafe and that she should apprise

Robert Sabo, (Sabo) owner of Sabo's Cafe, of the investigation.

Approximately four (4) days later, Sabo was informed directly by Turzai of the investigation. Turzai told Sabo that he had seen an investigative report and it "was something to do with selling to minors . . . and some sort of lottery. . . ." During Sabo's interview with Danyluk, he indicated that he not only knew about the investigation, but Turzai also told him the first name of the investigator, (Sam) and provided a physical description of the investigating officer. The physical characteristics described by Sabo fit the description of Cangey. Sabo indicated that the investigating officer Cangey had dark hair, greying at the sides, wore glasses and lived in Monroeville.

Sabo provided Danyluk and Herron with the informer's height, weight, name ("Rich") and the area in which the informer resided (South Side). Only after receiving this information did Danyluk suggest the last name, Turzai. Sabo replied, "That's him, that's correct." Sabo independently identified Turzai as the informer at the Commission hearing. Sabo indicated that he freely gave information to Danyluk and Herron.

Cangey was removed from the assignment of investigating liquor law violations at Sabo's Cafe prior to its completion. Another officer was assigned, for Cangey could not effectively complete the investigation since his identity was revealed.

Berg indicated that Turzai was informed of the charges against him verbally prior to receipt of notice. He was told the name of his accuser, Sabo; informed about the specific incident, Sabo's was tipped off concerning a

complaint; and the date of the incident. This information was provided again to Turzai in his removal letter.

During the course of the hearing, Turzai sought to admit a document prepared by Danyluk regarding his investigation. This hearsay evidence was excluded; however, it was utilized by Turzai during cross-examination in an attempt to impeach Danyluk, the preparer of the document.

By Order dated February 23, 1984, the Commission found that there was just cause for the LCB's removal of Turzai from his position as an Enforcement Officer II. No bias was found in Danyluk's investigation and the LCB's witnesses were found to be credible. Thereafter, the matter was appealed to the Commonwealth Court of Pennsylvania who considered the issues raised before your Honorable Court on Petition for Writ of Certiorari. Again, it was found that Turzai was dismissed for just cause and his appeal was dismissed. On January 27, 1986, Turzai's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied.

REASONS FOR DENYING WRIT

The Commission found that the LCB proved by a preponderance of the evidence that Turzai was terminated for just cause. The Commission was sensitive to the need to protect undercover officers who are jeopardized by disclosure of an investigation by a fellow officer. It was not the LCB who placed Turzai's position in peril; rather it was Turzai's own misconduct which brought about his dismissal and subsequent disrepute.

The decision which is subject to this Petition does not warrant consideration by this Court for several reasons. First, the decision is manifestly correct based on credibility of witnesses and findings of fact. Second, the decision is consistent with prior decisions. Third, the decision turns upon its own facts and will not effect subsequent adjudications.

a. The Notice of Violation provided to Petitioner was sufficient under state law and met due process requirements.

> The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved the demands of due process are fulfilled.
>
> *Anderson National Bank v. Luckett,* 321 U.S. 233, 246.

Both the Commission and the Commonwealth Court of Pennsylvania, upon review, found that Turzai received adequate notice of the charges against him in order to prepare a defense. This conclusion was consistent with *Wood v. Commonwealth of Pennsylvania, Department Public Welfare,* 49 Pa. Commonwealth Ct. 383, 411 A.2d 281 (1980), which held that a "removal notice need not be drafted with the certainty of a bill of indictment, but that due process does require that it be framed in a manner which enables the employe to discern the nature of the charges and adequately prepare a defense." *Benjamin, Aplnt. v. Commonwealth of Pennsylvania, State Civil Service Commission,* 17 Pa. Commonwealth Ct. 427, 332 A.2d 585 (1975). Unlike the removal notice in the instant matter, the removal notice that was found insufficient in *Wood,* supra, simply stated that the employe was being removed for "continued, unsatisfactory work performance." In *Chavis v. Philadelphia County Board of Assistance, Department of Public Welfare,* 29 Pa. Commonwealth Ct. 205, 370 A.2d 445 (1977), the Commonwealth Court of Pennsylvania found that the notice provided was insufficient as it contained broad allegations such as "concealment of a material fact by omission," "gross negligence," "neglect of duty," and "failure to comply with instructions."

In the matter herein, it was found that Turzai was sufficiently apprised of the charges against him, consistent with the requirements outlined in the aforementioned prior decisions. His removal notice of August 5, 1983 was not broad or general. It contained specific charges against him, i.e. where the disclosure of confidential information occurred, the time period of the incident and the provisions of the Manual of Instruction which he violated. The

testimony also established that Turzai was informed verbally by his supervisor prior to the receipt of the official removal notice of the name of his accuser, the nature of the violation and the date of the incident.

Turzai was so well apprised of the charges against him that after he received the removal notice, and prior to the Commission hearing, he attempted to intimidate witness Sabo by going to his house on a Sunday. He showed Sabo the removal notice and informed him that he was being discharged for disclosing confidential information. Turzai sought to compel Sabo to disregard a subpoena for if Sabo didn't appear at the Commission hearing to testify, then nothing would happen to Turzai. The notice provided to Turzai and Turzai's conduct clearly indicated to the Commission and the Commonwealth Court of Pennsylvania that Turzai was more than sufficiently apprised of the charges against him, thereby satisfying the requirements of Due Process.

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b. The Pennsylvania Civil Service Commission did not commit reversible error and deny Petitioner his due process rights when it limited the use of an investigative report at the hearing.

Procedural due process in administrative proceedings is generally recognized to be a matter of greater flexibility than when dealing with strictly judicial tribunals. *Lacoumastic Corporation v. Parker,* 64 F.Supp. 138 (1944); *Mackatunas v. Finch,* 301 F.Supp. 1289 (1969). Turzai contends that he was denied due process of law when the Commission limited the use of an investigative report pre-

pared by Danyluk. Commission Chairwoman Barnes stated:

> I would suggest that you [Turzai] could use the report. We don't normally put investigative reports in full, in the record simply because there is a certain confidentiality of information between the people being investigated and our records are public.

We prefer to get that evidence some other way.

Turzai's counsel thereafter requested a copy of the report "so that he could properly cross-examine Mr. Danyluk as to what happened in that investigation." The Commission allowed the report to be used, "for the purpose of cross-examination where it would vary from the testimony of the witnesses themselves." Turzai had full access and unfettered use of the document for cross-examination at the Commission's hearing. He utilized all portions of the document which he felt were "damaging to the Commonwealth's case." Introduction of the document would have served no legal purpose besides reiterating that which was elicited from the witness who prepared the document.

In *Kubit v. Russ,* 287 Pa. Superior Ct. 28, 429 A.2d 703 (1981) and *Pittsburgh National Bank v. Mutual Life Insurance Company of New York,* 273 Pa. Superior Ct. 592, 417 A.2d 1206 (1980), the Court indicated that "error in excluding evidence is harmless if excluded evidence would have repeated evidence that was otherwise admitted." Moreover, the Court in *Flynn, Appellant v. City of Chester,* 429 Pa. 170, 239 A.2d 322 (1968), held that the "refusal to admit defendant's deposition offered by plaintiff was harmless error in view of the fact that plaintiff had been able to call defendant on cross-examination and question her as fully as desired and that plain-

tiff was permitted to use the deposition to impeach. Pa. R.C.P. 4020[a]."

Proof of denial of due process requires a showing of substantial prejudice. *Ka Fung Chan v. I.N.S.*, 634 F.2d 248 (1981). Turzai must show substantial prejudice by the Commission's denial to admit the investigative report. Turzai, who reviewed the document, failed to show that admission of the document would have altered the decision of the Commission. Quite the opposite was demonstrated, for Turzai's purpose in utilizing the document was to attack the credibility of its maker, which Turzai attempted to do on cross-examination. The Commission weighed the evidence elicited on cross-examination and found that Turzai failed to discredit the investigator or the investigation. Thus, Turzai failed to demonstrate undue prejudice with respect to his inability to introduce this document into evidence.

Turzai failed to demonstrate that he was unable to prepare a defense as a result of not receiving the document prior to the time of hearing. There was no assertion that witnesses other than the maker of the document were necessary in order for Turzai to prepare a defense.

The discovery provided Turzai was found to be adequate by both the Commission and the Commonwealth Court of Pennsylvania. Turzai alleged that the investigation conducted by Danyluk was biased and that his last name was suggested to the witnesses. The Commission found, after Turzai's extensive cross-examination of the investigator, that no bias was shown. All witnesses indicated that they were willing to talk to the investigator, but did not want to give a *written* statement. These witnesses further indicated that they were subpoenaed to

appear at the Commission hearing and Turzai unlawfully disclosed an investigation of a liquor licensed establishment. Turzai was identified as the informer by the witness at the Commission hearing.

The Commission found the LCB's witness to be credible and the rulings on the admission of the investigative report did not constitute reversible error which is consistent with prior decisions.

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c. The Petition does not present a federal question of significance.

The Pennsylvania Supreme Court has declined to hear the discretionary appeal of this matter, applying a procedural rule expressly modeled on United States Supreme Court Rule 19 and employing similar considerations. Rule 114 Pa. R.A.P. provides that an appeal is "not a matter of right, but of sound, judicial discretion and an appeal will be allowed only when there are special and important reasons therefor." The issue in this case is whether Turzai was provided with notice consistent with Due Process State Requirements and whether Turzai was able to defend against the charges. The Commission determined that the Petitioner was discharged for just cause and all requirements were met. This decision was affirmed by the Commonwealth Court of Pennsylvania.

CONCLUSION

Wherefore, based on the foregoing, Respondent respectfully requests this Honorable Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,
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